IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

APPEAL FROM ORDER NO.944 OF 2004
IN
REGULAR CIVIL SUIT NO.199 OF 2004

Smt.Shailadevi Damodarprasad
Bhadani & Ors. ... Appellants

V/s.

Shri Harishchandra Anant
Pandit & Ors. ... Respondents

Mr.N.H. Seervai with Mr.R.P. Puniwala and Mr.Y.R. Shah for Appellants
Dr.V.V. Tulzapurkar i/b M/s.Wadia Gandhy & Co. for Respondent No.25
Mr.K.K. Singhvi with Mr.J.Xavier for Respondent No.26
Mr.R.S. Apte for Respondent No.27
Mrs.G.P. Mulekar, AGP, for Respondent No.30

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: **NOVEMBER 5, 2004**
JUDGMENT PRONOUCNED ON: **DECEMBER 17, 2004**

JUDGMENT:

. Admit. By consent of the parties, Appeal from Order taken up on Board and heard finally.

. The order passed by the Civil Judge, Senior Division, Thane dated 5.10.2004 is challenged in the present Appeal from Order. The trial Court has dismissed the application filed under Order 39 Rule 1 and 2 of Civil Procedure Code by the appellants, who were the plaintiffs in the trial Court in Special Civil Suit No.199 of 2004.

2. The facts involved in the present appeal are as follows:

The appellants, who are the Bhadani family members, claim that their predecessor one Jhariram Bhadani purchased property in Village Panchpakhadi, Thane bearing Survey No.427 to 435 and 485 admeasuring about 68 acres. This purchase was made in the year 1950. It appears that suit No.221 of 1960 was filed by one branch of Bhadani family against another. It appears that the joint family properties were divided amongst the parties to the suit and consent terms were filed before the Court on 19.3.1971. A decree was accordingly drawn up. Under the decree Shri Damodhar Prasad Bhadani, the predecessor of the appellants became entitled to Survey No.431 admeasuring 1 acre and 24 gunthas and part of survey No.432 admeasuring 13 acres 37.7 gunthas. The appellants claimed that this land fell on the boundary between the Thane Municipal Corporation (for short, 'TMC') and the Bombay Municipal Corporation. In 1974, the development plan of the city of Thane was published and the survey numbers were changed. A part of the Survey No.432 was shown as site No.38 and was reserved for open space. Another part of Survey No.432 was shown as site No.79, reserved for a primary school. According to the appellants, the reserved area aggregated to 19200

sq.mtrs. out of the entire land which comprises the suit property. It appears that the reservation was removed and the area was included in site numbers 38 and 79. In 1987, some other properties of the Bhadani family, under reservation, was dereserved. In 1991, the State Government declared the reservation of the suit property as having lapsed. The appellants were permitted to convert the user of the suit property from industrial to residential. Plans were submitted on behalf of the appellants to the TMC for development of 19200 sq.mtrs. of the suit property by constructing three buildings. These plans were sanctioned and occupation certificate was granted in respect of the building Numbers 1, 2 and 3. It appears that the amended plans were submitted by the appellants for a proposal to construct the 4th building of 14 floors plus stilts.

3. It appears that on 10.2.2003, a civil suit was filed against the appellants being suit No.77 of 2003 purportedly in public interest for an injunction against the appellants from carrying out further work on the suit property. On 24.3.2003, the Thane Municipal Corporation, that is Respondent No.27, issued a notice against the appellants for carrying out construction of a building without proper sanction. According to the appellants, this building was being built on their land

by Respondent No.25 and it was only because a notice was issued to them by the TMC that they realised that Respondent No.25 had already constructed the building 'Nishad' consisting of ground plus five storeys and were in the process of constructing another building on the appellants' land. It appears that despite the appellants calling upon the BMC to furnish the copies of the plans sanctioned in favour of Respondent No.25 they were not furnished these plans by the BMC that is Respondent No.26. However, on 24.7.2003, the appellants were informed by the BMC that the property which was being developed by Respondent No.25 fell within the jurisdiction of Mumbai. On 23.8.2003, the Civil Judge, Senior Division, Thane passed an order in the suit filed by one Ganesh Sawant confirming the ex-parte injunction granted against the appellants from carrying out further work on the suit property. This order was challenged by the appellants in this Court in Appeal from Order No.768 of 2003. The Appellants had denied the allegations of Ganesh Sawant that they were developing their property contrary to the Development Control Rules and the development plan and in a manner which would be hazardous to health. In November 2003, this Court directed the Taluka Inspector of Land Records, Thane that is Respondent No.29 (TILR), to carry out measurements of the suit property and to file a report to enable the appellants to obtain the occupation

certificate. The TILR submitted his report and came to the conclusion that the storm water drain (nalla), which the appellants claim ran through their property, did not form part of the boundary between Mumbai and Thane. This Court by an order dated 8.3.2004 set aside the interim relief granted by the trial Court. This Court directed the appellants to file an undertaking to complete the remaining construction at their own risk and not to claim equities in respect of the construction. Third party purchasers were directed to be informed of the pending litigation. The Apex Court has confirmed this order on 6.5.2004.

4. A stop-work notice was issued by the TMC against Respondent No.25 who challenged the same in RCS No.398 of 2003 before the Civil Judge, Senior Division, Thane. The TMC was injuncted from implementing the stop work notice. The appellants sought to intervene in the matter under Order I Rule 10 of Code of Civil Procedure. This intervention application was disallowed. The order has not been challenged by the Appellants. The appellants being of the view that Respondent No.25 had encroached on their lands by about 9861 sq.mtrs. filed the present suit before the Civil Judge, Senior Division, Thane being Suit No.199 of 2004. The appellants also filed the application at Exhibit 5 under Order 39 Rules 1 and 2 r/w Section 151 of the Code of

Civil Procedure. The trial Court dismissed the application filed by the appellants and vacated the earlier order of status quo.

5. The entire dispute has arisen because the appellants claim that their lands which extend upto the boundary between Mumbai and Thane, fall beyond the nalla and that this nalla flows through their property. Respondent No.25 on the other hand contends that the nalla itself acts as a boundary between Mumbai and Thane. The appellants claim that the construction undertaken by Respondent No.25 in the case of Nishad building and in the case of proposed construction where excavation work has started, falls within their lands. The respondents claimed that since the nalla is the boundary between Mumbai and Thane and their lands admittedly fall within Mumbai upto its boundary with Thane, the construction which they have commenced does not fall within the lands held by the appellants.

SUBMISSIONS:

6. Mr.Seervai, learned Counsel appearing on behalf of the appellants, submits that the lands of the appellants were shockingly encroached upon by Respondent No.25. He submits that the impugned order is contrary

to the judgment of this Court (Kanade, J.) in the Appeal from Order No.768 of 2003 where it has been held "it is an admitted position that the area beyond the nalla is also owned by the appellants". The learned Counsel also submits that although the TILR report contained a statement that the boundary between Mulund, which is a part of Mumbai, and Thane, overlapped, this Court, while considering the TILR report, has observed that in the absence of any documentary record to indicate that the area beyond the nalla falls within the jurisdiction of BMC, the observation of the TILR that the area of the plot was only 9000 sq.mtrs. becomes doubtful. According to the learned Counsel in view of these clear findings of this Court, the trial Court ought not to have refused the injunction sought by the appellants. The learned Counsel urges that every map which the appellants have produced showed the nalla in the property of the appellants and therefore, it was obvious that Respondent No.25 had encroached on their property. He alleges that the appellants have been deprived of their property by Respondent No.25 with the connivance of the BMC. The learned Counsel also submits that the TMC itself questioned the construction which Respondent No.25 had undertaken on the suit land which indicates that the property was within the jurisdiction of the TMC. He urges that the BMC could not have sanctioned these plans of Respondent No.25 since the suit lands did

not fall within its jurisdiction.

7. Dr.Tulzapurkar, learned Counsel appearing on behalf of Respondent No.25, that is the contesting Respondent, submits that this Court should not interfere with the interlocutory orders if they are passed on the basis of well settled principles of law and have not been passed arbitrarily, capriciously or perversely. He submits that although a different conclusion from the one arrived at by the trial Court may be possible on a reassessment of the material, if the trial Court has reached a conclusion which is reasonably plausible on the basis of the material on record this Court should not interfere with the impugned order. The learned Counsel places reliance on the judgments of the Apex Court in *Wander Ltd. & Anr. v/s. Antox India P. Ltd.*, **1990 (Supp) SCC 727** and *Colgate Palmolive (India) Ltd. v/s. Hindustan Lever Ltd.*, **(1999) 7 SCC 1**.

8. The learned Counsel submits that the TILR's report indicates that the boundaries between Thane and Mumbai overlapped and that the suit property could not be taken into consideration as it falls within the boundary of BMC. The learned Counsel submits that despite this Court's observation that the appellants could challenge the report submitted by the TILR, the appellants have failed to do so and the report of the

TILR indicated that a part of the suit property fell within Mumbai. The learned Counsel also submits that construction of Nishad building commenced some time in the year 1994 and flats have been handed over to the purchasers in 2002. The proposed building has also been sanctioned and the excavation work for that building has already commenced. He urges that there is a gross delay in appellants approaching the Court for interim relief and, therefore, the trial Court had rightly not granted any relief. He then submits that neither the deed of conveyance which conveyed the property to the appellants nor the consent terms under which the predecessor of the appellants obtained title to the properties indicated that the nalla flowed through their properties. The learned Counsel submits that none of the maps annexed either to the conveyance or to the consent terms indicate that the nalla flowed through the appellants' property

9. Mr.Singhvi, learned Counsel appearing for the BMC, submits that the development plan of Mumbai was finalised much earlier than the development plan for the Thane city. He submits that the development plan of Mumbai showed that the nalla ran along the boundary between Mumbai and Thane in the Panchapakadi area. He further submits that the plans were sanctioned by the BMC in favour of Respondent No.25 after verification of

the area and after ascertaining whether the suit property fell within the jurisdiction of Mumbai. He urges that the BMC in its reply filed before the trial Court has indicated as to how the property register card and the CTS plan submitted by the architect of the appellants were in respect of lands belonging to one Hiralal Prajapati and others in the capacity of lessees. According to Mr.Singhvi, the plans were granted on the basis of the property register card and the plan for the land under reference which was last approved on 31.8.2000. According to the learned Counsel, the plans submitted by Respondent No.25 have been correctly approved by the BMC and no fault could be found with the BMC since the suit property fell within its jurisdiction. He submits that the TILR plan gives a clear indication that CTS No.4/1 to 4/7 which are villages in Mulund (West) are on the southern side of the nalla and are in possession of Respondent No.25. The land bearing Survey No.431 and 432 are lands in Panchapakadi, Thane. It is only these areas of the villages which are owned by the appellants and not the ones falling in Survey Nos.431 and 432 which are part of Thane.

10. Mr.Apte, learned Counsel appearing for the TMC, submits that the entire dispute has arisen because of the stop-work notice issued by the TMC to the appellants

for undertaking illegal construction. According to him, the TMC is bound by the order of status quo passed by the trial Court in RCS No.398 of 2003 filed by Respondent No.25.

CONCLUSIONS:

11. The appellants have produced a plan which is annexed at page 110 of the compilation filed in this Court by them to indicate the area which according to them has been encroached upon by Respondent No.25. This plan has been drawn by the architect of the appellants and is not admitted by the respondents. The plan shows the nalla flowing through the property of the appellants. Another plan which is annexed at page 115 of the same compilation and drawn by their architect superimposes the development plan with the plan showing the partition of the property owned by the Bhadani family. The suit property that is the property owned by Damodhar Prasad has been shown in red in this plan. However, there is no depiction of the nalla, which the Appellants assert flows through their property, in this plan. The plans at pages 110 and 115 have obviously been drawn contemporaneously. However, the nalla is conspicuous by its absence in the plan showing the superimposed development plan on the plan of the

partitioned property of the Bhadani family.

12. The submission of Mr.Seervai that all documents clearly indicate that nalla passes through the suit property is unsustainable for more than one reason. The earliest document that is the deed of conveyance on which reliance is placed by the appellants does not give any indication of a nalla flowing through the property. Furthermore, neither the consent terms which partitioned the Bhadani family property nor the plan annexed to them stipulate or depict the nalla flowing through the property of Damodhar Prasad, the predecessor-in-title of the Appellants. In fact, the third schedule to the consent terms which deals with the land bearing Survey No.431 (part), 432 (part) and 433 (part) shows that the property is bounded by on or towards the north by the proposed 44’ wide road; on or towards the south by the village boundary at Mulund on or towards the east by the proposed 44’ wide road and on or towards west by block No.1A and 1C. However, there is no mention of a nalla flowing through the property. The development plan of Thane city also does not indicate the nalla being part of the appellants’ property but instead it is shown as the boundary between the areas of the BMC and the TMC. The layout plan which was sanctioned by the TMC for the Bhadani family in respect of the property held by them also does not show the existence of a nalla flowing

through their property. All these factors in my view suggest that at a prima facie stage the trial Court cannot be faulted for concluding that the nalla was not flowing through the Bhadani family property.

13. The TILR, who has filed his report has indicated that the boundaries of the TMC at Panchpakhadi and of the BMC at MUlund, overlapped. However, Kanade, J. in Appeal from Order No.768 of 2003 has found that the report has been filed by the TILR without verifying the position of the possession of the Appellants, who were also the Appellants in the earlier Appeal from Order. The learned Judge has also recorded "It is an admitted position that the are beyond the nalla is also owned by the appellants". Mr.Seervai vehemently urges that Respondent No.25 is bound by this observation and therefore, cannot claim that the nalla flows along the boundary between the jurisdictions of the TMC and BMC. This submission cannot be accepted since Respondent No.25 was not a party to the earlier suit or the Appeal from Order filed by the Appellants where the observation was made.

14. The land on which the buildings were being constructed by Respondent No.25 were CTS No.4/1 to 7 which fell within the jurisdiction of the BMC and therefore, in my view, no fault could be found with the

trial Court for refusing the injunction. The appellants had at no point of time taken objection to the building Nishad which was completed and flats were handed over to the buyers some time in the year 2002. There is no reason stated by the appellants as to why they took no objection to the construction of this building which consists of ground plus five storeys. It is difficult to gather from the record before me as to why the appellants have suddenly woken up to the fact that Respondent No.25 has constructed the building and is in the process of constructing another building on the disputed land. The reason sought to be advanced by the Appellants that they came to know of the construction only when they were issued a notice by the TMC seems to be a feeble attempt on the part of the Appellants to explain away the delay.

15. The trial Court hence considered all the documentary evidence on record and has rightly concluded that prima facie the suit lands fall within the jurisdiction of the BMC and, therefore, belonged to Respondent No.25. Admittedly, the Appellants' lands fall within the jurisdiction of the TMC. The trial Court has concluded that the plans were sanctioned by the BMC for Respondent No.25 after considering whether the lands fell within its jurisdiction. The appellants have not challenged those plans in the present suit. It

is difficult to comprehend as to how the appellants can succeed without challenging the sanctioned plans. The appellants have only challenged the alleged encroachment of Respondent No.25 on the lands which the appellants claim as they own. In my view, the trial Court has committed no error which requires interference by this Court.

16. Reliance placed by Dr.Tulzapurkar on the judgments in *Wander Ltd. & Anr. v/s. Antox India P. Ltd.*, **1990 (Supp) SCC 727** and *Colgate Palmolive (India) Ltd. v/s. Hindustan Lever Ltd.*, **(1999) 7 SCC 1** is apt. The apex Court has laid down the principles on which the trial Court's order should be interfered with by the appellate Court. Furthermore, in Colgate Palmolive (India) Ltd. (supra), the Apex Court laid down certain criteria on the basis of which interim relief should be granted. The trial Court has committed no error and, therefore, I do not think it necessary to interfere with the orders of the trial Court. The documentary evidence on record, including various maps, survey plans, etc. do not establish a prima facie case in favour of the Appellants.

17. Besides this, as observed earlier, the flats in Nishad building have already been sold to various flat purchasers and possession has been handed over to them

in the year 2002. Therefore, the balance of convenience is also not in favour of the Appellants. It cannot be said that the trial Court has passed the order by exercising its discretion either capriciously or arbitrarily or contrary to the well settled principles of law, requiring interference by this Court.

18. Appeal is, therefore, dismissed. No order as to costs.

19. Certified copy expedited.